Exhibit 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CALIFORNIA BERRY CULTIVARS, LLC, PLAINTIFF, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, DEFENDANT.	No. 3:16-CV-02477-VC

C O N F I D E N T I A L

VIDEOTAPED DEPOSITION OF

CHRIS VAN KESSEL

Thursday, November 17, 2016

Reported By:

KATHLEEN WILKINS, CSR #10068, RPR-RMR-CRR-CCRR-CLR

THE VIDEOGRAPHER: Will the certified court reporter please swear in the witness.

CHRIS VAN KESSEL,

having been duly sworn,

was examined and testified as follows:

THE VIDEOGRAPHER: Counsel.

MR. LIPPETZ: Thank you.

EXAMINATION BY MR. LIPPETZ

BY MR. LIPPETZ:

Q. Good morning, Dr. van Kessel.

Could you please state your full name for our record.

A. Full name is Christianis Hendricus Johannes van Kessel.

Q. And we'll have you spell that later.

And are you currently employed?

A. Yes.

Q. Where are you employed?

A. University of California.

Q. What is your current role or title there?

A. I'm a distinguished professor in the department of plant sciences at University of California, the Col of Ag, Environmental Science.

(Reporter clarification.)

Fine. You have a third copy. And I -- yes, I was -- I was -- yeah. I did ask that question. And I said, "Well, we will have a third" -- "we need a third copy."

"Fine."

Q. You were never told why they needed a third copy, though?

A. No.

Q. Your letter goes on to say:

"The transfer is to be for materials preservation only."

What did you mean by that?

A. Well, the copy of that material is going to go for -- for the future of the breeding program. So we want to preserve that for -- for the person who is going to come, for preservation. That material should be preserved. The material should be preserved for UC to be part of the next breeding program we will have -- we will have whenever we will find a replacement for the breeding program.

It is not to sell to private companies. It is not for whatever. It is to be -- it was preserved for the continuation of the plant breeding program in the future.

Q. And you go on to say that:

"The department 'will guarantee the security of this material to protect your commercial and research interests in any and all materials transferred.'"

What did you mean by that?

A. When you start a breeding program, the time between making the crops and potential release as a variety is about 10, 12 years. It might be a bit valuable, what is a crop. In strawberries, it probably will be 10 years. Okay.

If someone retires from University of California who had established a breeding program, there will be material in the pipeline of which he or she was the inventor.

So if someone retires and there's material in the pipeline that becomes patentable, then even when this person is not on campus anymore or retired, he or she should still be -- have the opportunity or even be asked or -- listen, we will file patent from a crop you made five, six, seven years ago. You will be listed on the patent. Your financial interests in that

material will be guaranteed.

That is not -- that is a policy for all members in the department who have a breeding program. If they retire and there is still material in that pipeline that can be patented, they will have the right, they will have the opportunity to be a co-applicant on that patent. It will not be the sole applicant, because there is someone else who took over, so there would be more than one person on the applicant -- on the patent. But they will have the possibility, the right, the guarantee to be member, to be cosign on that. That's what I mean by the security of the material to protect your commercial interests.

Q. So one commercial interest that Dr. Shaw had in the plant material he was turning over was the potential future revenue stream from patents that could be issued on one or more of the plants; yes?

A. Correct.

Q. The university has policies that also discuss the possibility of generating revenue for nonpatented tangible research projects; isn't that correct?

MR. CHIVVIS: Objection. Vague. Calls

for legal opinion.
BY MR. LIPPETZ:
Q. You can answer.
A. There are -- there are -- yeah. There's -- there's a -- I think there's a nonpatentable -- material -- there's no patent, but still have commercial value.
Q. When you were discussing Dr. Shaw's commercial interests, were you also including the possible commercial interests from revenue for nonpatented sources?
A. No. I was using the department policy that when the breeder retires and there is still material in the pipeline that can be patented, can generate royalties, the breeder who actually retired will be part of the patent. That's what I -- no more, no less I mean by that sentence.
Q. Why didn't you say "protect your potential patent revenue" instead of "commercial interest"?
A. I see patents sort of a commercial activity.
Q. You knew there were other ways to commercialize products of research at the university besides patents, right? We talked

on.

If this person has any interest in something he or she were doing prior to them, of course this person can continue that, even after he or she's retired. I was not making any exception. In this particular case, no, you cannot anymore use your material for your research interest. There might be some. Might be not some. But at least he would -- the breeders are treated similar like all the other ones.

Q. Do the professors at UC Davis generally own their own research?

A. UC policy is that when it comes down to material or discovery, there's a UC discovery, there's a UC material, can be patent, royalties will go to the inventor. But a material, the material from any breeding program remains UC property. That is not property of the inventor, and that is not property of the faculty member. That's clear. No doubt that material is UC material. That does not belong to the breeder. That does not belong to the inventor. It is UC material.

Q. Does the professor's research results, data they've collected, does that belong to the

professor?

MR. CHIVVIS: Objection. Vague. Calls for a legal opinion.

THE WITNESS: Yes, I think I will -- there must be legal opinion on that. The research results of a -- I mean, nontangible. I mean, there is not -- there is not plant or something. Resource data. Does the data belong? Yes, the data belongs also to the university.

What does -- does the -- I think I would almost say can -- there should be someone legal, how -- where the fine lines sits between data, the paper written, the communication done, the discovery.

My -- my initial feeling is that we are -- we are part of University of California. When we do research, when we discover something, that is a UC discovery. The inventor, of course, has benefit of that through the patent, but it remains a UC property.

But, again, I think you should get some -- someone from the office of the president to define clearly what belongs to university, what belongs to the faculty. When it comes down to plant material and the breeding program, that I

think is very clear, plant material from the breeding program, the varieties and so on, that is UC material.

If you want to use that material, you need an agreement, a license or whatever it is, from the university. You cannot just take it and go. It is UC material.

BY MR. LIPPETZ:

Q. You were and still are a professor at UC Davis, right? Yes?

A. I am professor?

Q. Yes.

A. Yeah, I am professor.

Q. You have conducted research as part of being a professor?

A. Yeah. I have done, yeah.

Q. And I think you said there's a fine line, which suggests to me that you believe there is some research that is yours versus some fine line between what is yours and the university.

MR. CHIVVIS: Objection. Misstates prior testimony.

THE WITNESS: I don't know where the fine line is. It might be everything. The UC might say, "Well, everything you do under the

licensing agreement.

Then in the second paragraph, he says:

"We believe that the only course of action left is for the department of plant sciences to support Doug's proposal to do a public release of the elite germplasm."

And then you write to a number of people a couple of days later describing a meeting of the variety release committee and concurrence that it will be up to the breeders to decide if they wish to proceed with a public release of the germplasm.

Do you see that?

A. Yeah.

Q. What is your understanding of the policy regarding the breeders' ability to do a public release of germplasm?

A. Breeders have the right or can express the opinion that their material will be public release. That has to be approved by IA, which might or might not concur with their opinion that the materials should be public released.

Public release means there's no royalty, so there's a financial stake in their discussion.

I can see why the university would not promote always public release.

But it is up to the breeder to express his own opinion that his or her material should be public released. If it will happen, then that's different question.

Q. In general, the type of material that would be considered for public release would be material that is not being pursued for patent protection; is that accurate?

MR. CHIVVIS: Objection. Calls for speculation.

THE WITNESS: Public release has been used for material which we think -- the breeder think it has low -- let's call it commercial value. It will never -- the cost of filing the patent probably will not generate enough income to cover the cost from the royalty income. So that is another reason why sometimes they go for public release. There are other reason, but this is one of them.

BY MR. LIPPETZ:

Q. So in your communication of June 2nd, where you say it will be up to the breeders to decide, you're not asking for permission. You're

Kirk Larson have ownership rights in the genetic materials and transition cultivars developed in the university's strawberry breeding program?

A. No, I do not. What I said earlier, the breeding programs, in general -- had nothing to do with strawberry specifically. When someone has a breeding program or otherwise, the material -- the plant material in that -- in that program is UC property. If that ends up to be a variety, it remains UC property.

The breeders are the inventors. They are not the owners. UC is the owner of the material. So I disagree with that conclusion, that they have ownership rights. No. The UC has ownership. They are the inventors.

Q. Do you think the statement you just made about the university's ownership rights was a fact commonly known in the plant sciences department prior to the sending of Exhibit Number 24?

MR. LIPPETZ: Objection. Speculation.

THE WITNESS: It is known by all breeders, and I would always say includes -- including the strawberry breeders, that the material belongs to the university. That is known as long as I've been the chair of the department,

even before that. All breeders know that the product coming out of pipeline is UC -- is owned by the UC.

Yes. I can say that -- I can say clearly that that -- that all breeders know that their material belongs to the university.

BY MR. CHIVVIS:

Q. Do you think Doug Shaw knew that the material was owned by the university?

MR. LIPPETZ: Objection. Speculation.

THE WITNESS: Yes, he did.

BY MR. CHIVVIS:

Q. Did he ever say as much to you?

A. Yes, he did.

MR. CHIVVIS: I'd like to mark another exhibit. Next in order.

What are we on?

THE REPORTER: 46.

MR. CHIVVIS: 46.

MR. LIPPETZ: Yeah, help me out with that.

(Whereupon, Deposition Exhibit 46 was marked for identification.)

THE WITNESS: Spare copy?

MR. LIPPETZ: 46?

BY MR. CHIVVIS:

Q. Dr. van Kessel, by Point Number 3, did you have any intent to recognize that Dr. Shaw or Dr. Larson or California Berry Cultivars owns any rights in the germplasm that's described in Exhibit Number 30?

A. None. The -- there was no intent whatsoever to give any indication or -- an indication that by writing this memo to Doug, he would have legal right, or whatever it is, of the material he was working with. No. That was never the intent of -- of this -- of this letter. No. Never.

Q. And do you believe that Dr. Shaw would have known, both before and after receiving this letter, that he had no ownership interest in the germplasm described in the letter, Exhibit 30?

MR. LIPPETZ: Objection. Leading and calls for speculation.

MR. CHIVVIS: Let me rephrase.

Q. What's your position, if any, on whether Doug Shaw would have known, either before or after receiving this letter, that he had no ownership interest in the germplasm described in Exhibit 30?

MR. LIPPETZ: Same objections. Same

objections.

THE WITNESS: The department of plant science cannot release varieties or give germplasm, or whatever is plant material, without going through the proper protocol. The department is not -- has no legal status, has no legal authority to release to the public, to third parties, any material. It has to go through the proper channels.

It means it has to go through the department. The recourse has to be made by the department, faculty to the department chair to the dean to IA, to chancellor of research. They are the ultimate decision-making whether or not to release material to -- I say to a third party or to patent, whatever -- whatever -- whatever it is -- that -- that -- a decision is never made at department level.

All breeders know that. We advise the dean, the dean advise the vice chancellor, and that's where the decision is being made. Whether I even like to do that, it would have been overruled right away. I don't have the authority.

BY MR. CHIVVIS:

Q. Would Dr. Shaw have known that?

MR. LIPPETZ: Objection.
THE WITNESS: Absolutely.
MR. LIPPETZ: Speculation.
THE WITNESS: Absolutely. He knows the process. He knows very well the process. He has gone through that for 38 times in his career when he was going for patent. That always had to go through the department. It was never the department made the final decision on releasing the varieties. The department can't do that.
So, no, he knows that release of a variety has to go through the proper channels. And the decision of that, to release or not to release, is not at a department level. That is at the vice chancellor level.
BY MR. CHIVVIS:
Q. Would Dr. Larson have known that?
MR. LIPPETZ: Objection. Speculation.
THE WITNESS: Absolutely. This is standard protocol. Doug Shaw and Kirk Larson know the standard protocol.
BY MR. CHIVVIS:
Q. At the time you wrote the letter reflected in Exhibit Number 30, who owned the germplasm that's described in that exhibit?

Q. And that rule was?

A. That it has to go through the proper channels. The req will be made, the chair support or not support. It goes to the dean's office, support or not support. Goes to IA, the vice chancellor research. They have to make a final decision, yes or no, to release plant material, tangible research product, whatever, variety, to the public.

That process has been followed, and I always assumed that Doug has to follow the same thing. I was -- if the UC has a different rule 30 years ago, when Doug came aboard and he was still using that policy, I was not being told.

Q. What was the rule as you just stated on where ownership lies?

MR. LIPPETZ: Objection. Asked and answered.

THE WITNESS: The ownership of the plant material belongs to UC. Period.

MR. CHIVVIS: Nothing further.

MR. LIPPETZ: No questions.

THE VIDEOGRAPHER: This concludes today's videotaped deposition of Dr. Chris van Kessel. We're off the record at 4:58 p.m.

CERTIFICATE OF REPORTER

I, Kathleen A. Wilkins, Certified Shorthand Reporter licensed in the State of California, License No. 10068, hereby certify that the deponent was by me first duly sworn, and the foregoing testimony was reported by me and was thereafter transcribed with computer-aided transcription; that the foregoing is a full, complete, and true record of proceedings.

I further certify that I am not of counsel or attorney for either or any of the parties in the foregoing proceeding and caption named or in any way interested in the outcome of the cause in said caption.

The dismantling, unsealing, or unbinding of the original transcript will render the reporter's certificates null and void.

In witness whereof, I have hereunto set my hand this day:

_____ Reading and Signing was requested.

_____ Reading and Signing was waived.

___X___ Reading and Signing was not requested.

_____

KATHLEEN A. WILKINS

CSR 10068, RPR-RMR-CRR-CCRR-CLR